Nos. 88-1872, 88-2074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CYNTHIA RUTAN, *et al.*,
Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, *et al.*,
Respondents,

and

MARK FRECH, *et al.*,
Cross-Petitioners,

v.

CYNTHIA RUTAN, *et al.*,
Cross-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' AND CROSS-RESPONDENTS' REPLY BRIEF ON THE MERITS

Of Counsel:
MARY LEE LEAHY
Counsel of Record
CHERYL R. JANSEN
KATHRYN E. EISENHART
LEAHY LAW OFFICES
308 East Canedy
Springfield, Illinois 62703
(217) 522-4411

MICHAEL R. BERZ
One Dearborn Square
Suite 500
Kankakee, Illinois 60901
(815) 939-3322

Attorneys for Petitioners and Cross-Respondents

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

Nos. 88-1872, 88-2074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CYNTHIA RUTAN, *et al.*,
Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, *et al.*,
Respondents,

and

MARK FRECH, *et al.*,
Cross-Petitioners,

v.

CYNTHIA RUTAN, *et al.*,
Cross-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' AND CROSS-RESPONDENTS' REPLY BRIEF ON THE MERITS

INTRODUCTION TO ARGUMENT

Respondents' Brief is as significant for what it does not say as for what it does. Respondents do not, of course, dispute that the basis for the employment decisions in-

volved in this case, party affiliation, political support and voting history, lie at the heart of the First Amendment. Nor do they proffer any state interest to justify basing hiring and other job decisions on those factors. Certainly they do not argue that conditioning jobs on support of an officially favored political party is intended to right a prior constitutional wrong.

Respondents do, however, ignore the well-established precedent set by this Court that the state is prohibited from denying benefits on a basis that infringes constitutionally protected interests.

> It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

Contrary to the allegations of the Complaint, Respondents seek to describe the case as if it did not deal with a structured system of hiring based on political affiliation, but on acquaintance and friendship.

Respondents also make the argument that hiring and other job decisions short of discharge are not important enough to warrant application of the First Amendment. Such an argument is plainly contrary to the long established precedent of this Court.

Respondents' suggestion in this regard is, however, far reaching and dangerous. It would allow public officials, even those administering a civil service system, to condition benefits of employment on support of an officially favored party or ideology.

The rule of law Respondents seek from this Court cannot be confined to political affiliation. It extends to belief on fundamental issues of public concern, for such is the

basis of political affiliation. The full implications were well stated by Judge Ripple:

> The majority's holding today will subject countless dedicated government workers, for whom party affiliation is not an "appropriate requirement for the effective performance of the public office involved," *Branti*, 445 U.S. at 518, to harassment because they have chosen not to contribute to or work for a particular candidate or cause. For instance, the clerical worker who has strong views on the abortion issue and refuses to support a candidate of opposing views may be passed over for promotion, denied transfer to a more favorable location, or assigned the most undesirable tasks in the office. The worker who decides not to support a particular candidate because, in the worker's view, the candidate is not committed to racial equality can be treated in identical fashion. This growing acceptance of infringements on first amendment rights on the ground that the curtailment is minor is indeed a disturbing trend. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way. . . ." *Boyd v. United States*, 116 U.S. 616, 635 (1886). (Petition for Certiorari, pp. B-34-35).

ARGUMENT

I. The Complaint Alleges A Government Employment System By Which Important Benefits Of Employment Are Conditioned On Political Affiliation.

Respondents have sought to distort and trivialize the Complaint as if promotion, transfer, recall from lay-off and hire were not conditioned upon political affiliation. This is precisely the opposite of the allegations of the Complaint:

Introductory Statement

1. This is a class action by Plaintiffs against Defendants, who are officials and employees of the State of Illinois, and Defendants, who are persons acting in concert with Defendant officials and employees, asking this Court to declare illegal and unconstitutional Defendants maintaining and operating a political patronage system by which political and financial supporters of the Republican Party of the State of Illinois, are favored in regard to State of Illinois employment and which system discriminates against those who are not such political and financial supporters in regard to State of Illinois employment. This action also asks that the Defendants be enjoined from operating and maintaining the political patronage system. (R.A. 2).

The employment system at issue in this case is a structured, formalized system whose "purpose and effect . . . is to limit state employment and the benefits of state employment to those who are politically favored and to limit and prevent those who are not favored from having such employment benefits. . . ." (para. 11k of Complaint, R.A. 8).

The specific allegations as to Petitioners Rutan and Taylor clearly indicate their promotions were conditioned on politics.

> Plaintiffs, Cynthia Rutan and Franklin Taylor are employees of the State of Illinois . . . who . . . have been and are *denied promotion because they are not deemed politically acceptable or approved by defendants.* (para. 7a, Complaint, R.A. 4). (emphasis added).

Paragraphs 8a and 9a of the Complaint make the same allegations as to denial of Petitioner Taylor's transfer and the failure to recall Cross-Respondents Standefer and O'Brien from lay-off.

Petitioner, James W. Moore . . .

> is a member of and appropriate representative of a class of persons who have been and are desirable of becoming employees of the State of Illinois but *have been denied employment because . . . they are not deemed politically acceptable or approved by Defendants.* (para. 10a, Complaint, R.A. 5-6). (emphasis added).

The Complaint clearly meets the standard set forth in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), in that political considerations are a substantial or motivating factor in making the employment decisions in this case.

Paragraph 11f of the Complaint reads:

> 11f. In making decisions regarding employment, promotion, transfer and other employment matters, Defendant Thompson's employees in the "Governor's Office of Personnel" are *substantially motivated by political considerations. Such political considerations include whether the individual* under consideration is Republican or a relative or friend of a Republican, *is sponsored by an influential Republican, is a financial supporter of the Republican party or an influential Republican,* is a friend or supporter of Defendant Thompson or is sponsored by a member of the Illinois General Assembly who is deemed to be a friend or supporter of Defendant Thompson. (R.A. 7). (emphasis added).

Respondents have quoted from this allegation to make it seem as if politics is just one factor along with other factors such as friendship. Plainly the use of the term friend in this context means supporter or contributor. But this Court need not address the meaning of friend, for a fair reading of the Complaint indicates politics is the substantial or motivating factor in granting these important benefits of employment.

These allegations are given additional coloration by the form used by the incumbent party (Exhibit B attached to the Complaint, R.A. 24), the letter from Representative Winchester (Exhibit C attached to the Complaint, R.A. 25-26) and the check of voting records. (para. 11g of Complaint, R.A. 7). It is clear that the very type of political coercion rejected in *Elrod v. Burns*, 427 U.S. 347 (1976), is present in this case as is the very type of sponsorship rejected in *Branti v. Finkel*, 445 U.S. 507 (1980). As was clear in *Branti*, the requirement of political sponsorship alone was sufficient to state a cause of action. Read as a whole under the rules of *Jenkins v. McKeithen*, 395 U.S. 411 (1969), the Complaint alleges that politics were decisive.

The claim is simple: the Petitioners and Cross-Respondents were disqualified from important benefits of employment on impermissible First Amendment grounds.

II. No Constitutional Distinction Can Be Made Between Politically Conditioned Firing And Other So Conditioned Employment Decisions.

Respondents argue that conditioning hiring and other benefits of employment on political affiliation does not significantly burden First Amendment rights, that any such burden is so minimal that such practices do not even require any state interest, let alone a compelling one. This argument is, however, directly contrary to long-standing precedent, which Respondents choose to ignore. It is contrary, as well, to basic common sense.

Respondents' position is that a person's interest in being hired for a state job or in receiving promotions, transfers and recall from lay-off is not important enough to justify application of the Constitution's protection of freedom of

speech or association. This exceptionally dangerous position has been repeatedly rejected by this Court.

In *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947), and *Weiman v. Updegraff*, 344 U.S. 183 (1952), this Court stated that no law can deny a government job based on the applicant's being a "Republican, Jew or Negro." In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), this Court held that a state could not condition governmental hiring on an applicant's avoidance of certain views. And in *Torcaso v. Watkins*, 367 U.S. 488 (1961), which was not mentioned by Respondents, this Court held that public *appointment* could not be conditioned on grounds which violate the First Amendment. Even where persons have no "right" to public office, they do have the right:

> to be considered for public service without the burden of invidiously discriminatory disqualifications. The state may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees." *Turner v. Fouche*, 396 U.S. 346, 362-63 (1970).

These decisions would have been impossible under Respondents' suggestion that hiring is too trivial a matter to warrant application of the First Amendment.

Respondents' argument would leave the state free to base hiring, promotion, transfer or recall from lay-off on an applicant's religion, race or sex. After all, an applicant for a state job who is rejected because he or she does not hold particular religious views similarly can always fall back on the rest of the job market. This only demonstrates the full implications of Respondents' position.

There is no analytical difference in the application of the First Amendment between hiring, promotion, transfer, recall from lay-off and discharge. Getting a good job, ad-

vancing within one's chosen profession or being recalled from lay-off in a timely fashion are significant to everyone. Conditioning any of these decisions on a person's voting record, party affiliation or political activities significantly burdens the rights of political speech and affiliation, which are at the heart of the Constitution.

Respondents' Brief also virtually ignores the long standing precedent expressed in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), which held that the state:

> may not *deny a benefit* to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech. For if the government could *deny a benefit* to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would *in effect be penalized and inhibited.* This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible. (emphasis added).

That holding followed a long line of prior decisions. It formed the basis for the majority holding in *Elrod v. Burns*, 427 U.S. 347 (1976), and was reaffirmed in *Branti v. Finkel*, 445 U.S. 507 (1980). In *Connick v. Myers*, 461 U.S. 138, 142-148 (1983), the principles set forth in those prior decisions were extensively discussed and reaffirmed.

Respondents only reference to *Perry v. Sindermann*, 408 U.S. 593 (1972), a footnote claiming the decision was based on settled expectations, is not only without basis in *Perry*, but was rejected *in haec verba* in *Branti v. Finkel*, 445 U.S. 507, 512, n.6 (1980).

> Petitioner argues that because respondents knew the system was a patronage system when they were hired, they did not have a reasonable expectation of being rehired when control of the office shifted to the Democratic Party. A similar waiver argument was rejected in *Elrod v. Burns*, 427 U.S. 347, 360, n.13; see also *id.* at 380 (Powell, J., dissenting). After *Elrod*, it is clear that *the lack of a reasonable expectation* of continued employment *is not sufficient* to justify a dismissal based solely on an employee's private political beliefs. (emphasis added).

Sindermann's expectations of continued employment (a Fourteenth Amendment claim) was *not* the basis for upholding his First Amendment claim.

Use of political affiliation as a criterion for making the state employment decisions in this case inevitably will have the effect of deterring, or "chilling," the exercise of First Amendment right of association. The very purpose of the system is to coerce affiliation, support and contributions.

The conditioning of benefits in this case can also be viewed from another perspective. No examination of an actual inhibiting effect is necessary when a challenged state action is based on its face on the content of political speech. When the Respondents acted against the Petitioners and Cross-Respondents, they favored certain political affiliations and beliefs and disfavored all others. This they may not do.

> But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content. *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

This holding and that of *Perry v. Sindermann*, 408 U.S. 593 (1972), have been amplified in those cases in which the denial of an important public benefit has been withheld due to the content of the speech or association. Quite

simply, " '[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.' " *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984)) (invalidating a state law that provided a tax benefit only to magazines that published certain types of articles); *FCC v. League of Women Voters of California*, 468 U.S. 364, 383-84 (1984) (overturning a Congressional act that denied federal grants only to those noncommercial broadcasters that engaged in editorializing). *Cf. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (time, place and manner restrictions must be justified without reference to the content of the regulated speech).

Such discrimination is equally forbidden when the distinction is made on the basis of political belief and association (or lack thereof), for "[t]he right to associate with the political party of one's choice is an integral part of th[e] basic constitutional freedom [of association]." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973).

The state cannot discriminate in public employment on the basis of any constitutionally impermissible criteria. That is true whether the benefit be promotion, transfer, recall from lay-off or hire. This is so regardless of the "chilling" effect of the state action, for the state must remain neutral in alloting benefits. The state must not discriminate on the basis of the exercise of the fundamental constitutional right of freedom of association.

Examination of the actual inhibiting effect of a state action is only necessary where a challenged state action is *neutral* on its face, applying equally to all persons. In these instances, the Court's inquiry becomes whether the neutral action nevertheless implicates First Amendment

concerns because of its actual inhibiting effect on the First Amendment activities of certain groups.[1]

This case involves no such neutral practice. The employees here were discriminated against in the matter of employment benefits because they did not have the proper affiliation with the Republican Party. That governmental discrimination violates the First Amendment wholly apart from whatever chilling effect it may have.

III. Respondents' Distinctions Are Without Merit.

A. Denial Of A Benefit Is No Less Unconstitutional Than Negative Action.

Respondents have tried to distinguish denial of a benefit due to exercise of First Amendment rights from "punishment" for exercise of those rights. Petitioners and

---

[1] *See, e.g., Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) (examining whether neutral state election statute has inhibitory burden on associational rights of party); *Anderson v. Celebreeze*, 460 U.S. 780 (1983) (same); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (examining whether neutral state disclosure law will in fact subject minor party to inhibitory threats and harassment); *Buckley v. Valeo*, 424 U.S. 1, 69-74 (1976) (per curiam) (holding that factual showing of infringement on First Amendment associational rights must be shown by minor party in order to challenge neutral state disclosure law); *NAACP v. Button*, 371 U.S. 415, 432 (1963) (appraising neutral state attorney solicitation law to determine its "inhibitory effect upon [First Amendment] rights"); *NAACP v. Alabama ex rel. Patterson*, 356 U.S. 449, 460-63 (1958) (finding that neutral restraint upon the exercise by petitioner's members of their right of freedom of association). *See also Wisconsin v. Yoder*, 406 U.S. 205 (1972) (weighing severity of impact of state compulsory education statute on the free exercise of religion of particular church); *Sherbert v. Verner*, 374 U.S. 398 (1963) (determining that state unemployment benefit law neutral on its face would have an impermissible inhibitory impact on free exercise rights of members of certain church).

Cross-Respondents certainly dispute that narrowing of the term punishment. Withholding a benefit can be every bit as coercive as negative action and may be far more effective in achieving behavior modification.

This Court has recognized Respondents' attempted distinction is without meaning. *Perry v. Sindermann*, 408 U.S. 593 (1972), its predecessors and progeny, dealt with denial of a benefit. In *Elrod v. Burns*, 427 U.S. 347, 359 n. 13 (1976), this Court said:

> Since the government however, may not seek to achieve an unlawful end either directly or indirectly, the inducement afforded by placing conditions on *a benefit* need not be particularly great in order to find that rights have been violated. *Rights are infringed both where the Government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason.* (emphasis added).

Respondents also argue that the employment decisions were not made to punish but the effect on Petitioners and Cross-Respondents were incidental to benefitting others. This identical argument was, however, explicitly rejected by this Court in *Branti v. Finkel*, 445 U.S. 507 (1980). In *Branti*, the plaintiffs were discharged not to punish them for political views but to facilitate political hiring of their replacements. This was, however, held directly to infringe plaintiffs' own constitutional rights. There is no meaningful difference between not getting a job because one is not politically favored and not getting a job because one is politically disfavored. It is two ways of saying the same thing. See NEA Amicus Brief, pp. 6-7, n. 4.

B. The Holding Of This Court In *Wygant* Does Not Support Respondents' Position.

Respondents argue that hiring based upon political affiliation can be distinguished from political firing on the grounds it is "less intrusive." This is not a fair reading of *Wygant* in the context of this case.

In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), this Court followed the same three stage jurisprudence analysis as traditionally used in First Amendment cases using the standard of exacting scrutiny. Recognizing that all persons have the right to be free from discrimination based on race, this Court held any racial classification must be justified by a compelling state interest. This Court went on to address *the third stage* in the First Amendment case analysis, namely, whether the means chosen to serve that state interest, if it did exist, were defined in the least restrictive terms possible.

At that third stage, this Court rejected the Board's racially preferential lay-off policy saying the state interest could be met through less restrictive means including racially preferential hiring goals. But this Court recognized that *both* lay-offs and hiring goals were intrusive. This Court would have allowed the lesser of two evils, hiring goals, *only* if second prong of the First Amendment analysis had been met—namely, that such intrusion was necessary to serve a compelling state interest.

The same analysis occurred in each of the cases following *Wygant*. The Court first examined whether the government interests were sufficiently compelling to justify preferential treatment of any kind and then carefully analyzed the "fit" of the preferential treatment plans to the particular interest to be furthered. *United States v. Paradise*, 480 U.S. 149, 166-85 (1987) (plurality opinion);

Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 631-40 (1987).

Only in this *last* stage of the analysis did the issue of the degree of injury to the plaintiffs become relevant. And it arose *only* in the context of determining whether those injuries were necessary in order to further the *compelling state interest* of remedying discrimination, *i.e.*, whether the system was the least intrusive method of vindicating that interest.

The distinction between discharge and hiring was made in *Wygant* only to demonstrate that the lay-off plan was "not sufficiently tailored." *Id.* at 283. In *Paradise*, the plurality looked "to the impact of the [court-ordered] relief on the rights of third parties" *only* to determine whether the relief was "narrowly tailored" to the state's "compelling interest" in remedying racial discrimination. 480 U.S. at 171 (plurality opinion). The plurality concluded that the relief did not "*unnecessarily* trammel the rights" of innocent individuals. *Id.* at 183.

In *Johnson*, the Court also considered whether an affirmative action plan that was adopted for the legitimate purpose of remedying a manifest sexual imbalance in the workforce "*unnecessarily* trammeled the right of male employees." 480 U.S. at 637 (emphasis added). The Court's discussion of "unsettl[ing] . . . legitimate firmly rooted expectation[s]," then, arose only in assessing whether an affirmative action plan was closely tailored to meet a compelling governmental interest. The considerations of *Wygant* and its progeny are simply not present in this case.

Respondents have suggested, Resp. Br. at 23-24, 33-34 & n.18, that *Wygant* and the Court's subsequent cases discussed *supra* support their argument that injuries less severe than discharge "do not give rise to a constitutional claim," *id.* at 12, because they do not "rise to the level of a constitutional deprivation," *id.* at 36. This reliance on the *Wygant* line of cases is misplaced.

If the logic of Respondents' reading of these cases were played out, the cases would stand for the proposition that any type of discrimination by a public employer in promotion, transfer, recall from lay-off and hire *never* "give[s] rise to a constitutional claim," because, as Respondents put it, any action short of discharge does not "rise to the level of a constitutional claim." These cases obviously do not stand for any such proposition.

Contrary to Respondents' argument, the discussion in *Wygant* and subsequent cases is *not* a discussion about constitutional rights. Rather, it is a discussion about what kinds of employment actions are *properly tailored to serve specific compelling state interests.*

The problem facing Respondents is that they did not suggest *any* state interest, let alone a compelling one, that justifies violation of Petitioners' and Cross-Respondents' First Amendment rights. Since the second stage of the First Amendment analysis was never reached, the third stage cannot be reached. As this case stands, the question of least intrusive remedy does not even arise, for Respondents have failed to even suggest a compelling state interest to support *any* of their challenged actions. This Court is not faced with the uncomfortable choice of the lesser of two evils in order to remedy a prior constitutional wrong.

Cross-Respondents O'Brien and Standefer submit that the *Wygant* opinion lays to rest the notion that failure to recall them from lay-off due to political reasons was "insignificant" and does not "rise" to a constitutional violation.

> Many of our cases involve union seniority plans with employees who are typically heavily dependent on wages for their day-to-day living. *Even a temporary lay-off may have adverse financial as well as psychological effects.* A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. "At that point, the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker 'owns,' worth even more than the current equity in his home." Fallon & Weiler, Conflicting Models of Racial Justice, 1984 S.Ct. Rev. 1, 58, 106 S.Ct. at 1851. (emphasis added).

Applying *Wygant*, Petitioners and Cross-Respondents come full circle back to the traditional analysis of First Amendment cases. The patronage system is not being used to remedy a prior wrong. The Petitioners and Cross-Respondents are the innocent victims of adverse employment actions that serve no state interests but violate their First Amendment rights. Remedying this situation will simply allow the civil service system to proceed on merit principles without political considerations.

IV. The State Interests Alleged In The Amicus Commonwealth Of Puerto Rico's Brief Are Specious.

A. Stimulation Of Political Effort.

Amicus Commonwealth of Puerto Rico admits that the Illinois General Assembly could not pass a law permanently barring persons of a particular political affiliation from holding positions in government. But apparently Amicus Commonwealth of Puerto Rico believes the General Assembly could pass such a law for a period of four, eight or even twenty years—as long as the incumbent administration holds office.

Amicus Commonwealth of Puerto Rico's assertion that, somehow this situation will correct itself over time is simply not the purpose of the system in this case which is to perpetuate the incumbent party, to create "a significant political effort in favor of the "ins" . . . and against the "outs" i.e. those who may wish to challenge in elections." (para. 11k, Complaint, R.A. 8). This system does not promote political change.

Under the Amicus Commonwealth of Puerto Rico's theory, if a change in administration does occur, that administration will be free to exclude employees from promotion, transfer and recall from lay-off if they are not politically favored. That some other persons in the future may receive the benefits Petitioners and Cross-Respondents now seek is irrelevant. Their benefits are being denied now. Moreover, there is nothing in the record to indicate their denials would be remedied in the future.

Amicus Commonwealth of Puerto Rico's argument turns the Constitution on its head. The First Amendment was designed to protect the rights of the minority from the acts of the majority, not to reward that majority—nor to allow different groups to have their turn at violating constitutional rights.

Amicus Commonwealth of Puerto Rico's argument that the denial of a job is not so significant as to invoke any First Amendment protection is inconsistent with its other argument that political hiring stimulates political activity on behalf of the incumbent party. If, in fact, giving a job does stimulate political activity, that only demonstrates the impact so conditioning jobs has on First Amendment rights.

If stimulation of political effort is an overwhelming state interest, then the positions at issue should be *equally available* for all who are politically active, not just those active on

behalf of the favored party. There is no justification for conditioning jobs only on political effort for the incumbent party.

In *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), this Court rejected stimulation of political activity on behalf of the incumbent party as being a compelling state interest.

B. The Ability Of An Administration To Carry Out Its Programs.

In both *Elrod v. Burns*, 347 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), this Court recognized the need of an administration to implement its policy and programs. It can do so by firing and hiring policy makers for whom political considerations are appropriate; the other employees can be fired if they do not perform their duties. Neither Respondents nor Amicus Commonwealth of Puerto Rico have asserted that political affiliation is in any way relevant to the jobs in this case or relevant to carrying out any government policy. Indeed, they could not make such an assertion.

V. The Respondents' Position Invites Litigation.

Respondents caution against involving the federal courts in public employment decisions. This is not a state interest. Respondents suggest that a possible workload outweighs constitutional guarantees. The federal court system is, as it should be, now open to the First Amendment claims of public employees.

The federal court system has experienced its finest hours when it has protected the rights of citizens. That is what is at stake in this case.

> It is the practice itself, not the magnitude of its occurrence, the constitutionality of which must be determined. *Elrod v. Burns*, 427 U.S. 347, 353 (1976).

Petitioners submit the rule of law they seek will settle the law and lead to far less litigation than the approach of the Seventh Circuit Court of Appeals when it tried to reconcile its prior decisions upholding public employees' First Amendment rights with its decision in this case. *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989). Harassment is actionable even though it does not amount to constructive discharge. Failure to promote is not actionable unless it amounts to constructive discharge. Involuntary transfer is actionable without amounting to constructive discharge. Refusal to grant a transfer is actionable only if it amounts to constructive discharge. And *ad infinitum*. While Petitioners contend these are distinctions without meaning, Petitioners further contend that such distinctions only invite litigation.

In contrast is the simple rule of law sought by Petitioners—that denial of the benefits of promotion, transfer, recall from lay-off and a job cannot be based on political affiliation. It is as simple as the rule of law set forth in *Perry v. Sindermann*, 408 U.S. 593 (1972), *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980).

It is a rule of law that can be easily understood by the employer. The clear rule of law set forth in *Elrod* and *Branti* has not led to a plethora of litigation regarding political discharge.[2] That law will be clear and make the job of the employer much easier than trying to second guess as to whether their conduct is actionable. If a few public officials choose not to obey this law, then the federal courts must, and should, be open to allow redress of violations of constitutional rights.

---

[2] The assertion that upholding Petitioners' constitutional rights will flood the courts is contrary to the empirical evidence. Those circuits which have rejected the constructive discharge distinction have not experienced any significant volume of reported cases. Nor are state courts flooded with cases arising under state laws which prohibit political hiring or promotions.

CONCLUSION

Petitioners and Cross-Respondents have the right to hold particular political beliefs and to associate politically according to those beliefs without experiencing denial of important aspects of employment.

Petitioners and Cross-Respondents pray that this Court hold each Petitioner and Cross-Respondent has stated a cause of action and apply the rule of law set forth in *Elrod v. Burns*, 427 U.S. 347 (1976) and in *Branti v. Finkel*, 445 U.S. 507 (1980), namely, that the Respondents cannot deprive Petitioners and Cross-Respondents promotion, transfer, recall from lay-off and employment itself on the basis of political belief and association.

Petitioners and Cross-Respondents pray this Court remand this case for full hearing on the Petitioners' and Cross-Respondents' claims.

Respectfully submitted,

Of Counsel:
MARY LEE LEAHY
Counsel of Record
CHERYL R. JANSEN
KATHRYN E. EISENHART
LEAHY LAW OFFICES
308 East Canedy
Springfield, Illinois 62703
(217) 522-4411

MICHAEL R. BERZ
One Dearborn Square
Suite 500
Kankakee, Illinois 60901
(815) 939-3322

Attorneys for Petitioners and Cross-Respondents